

**LODI CITY COUNCIL
SPECIAL CITY COUNCIL MEETING
CARNEGIE FORUM, 305 WEST PINE STREET
THURSDAY, FEBRUARY 3, 2005**

A. CALL TO ORDER / ROLL CALL

The Special City Council meeting of February 3, 2005, was called to order by Mayor Pro Tempore Hitchcock at 6:02 p.m.

Present: Council Members – Hansen, Hitchcock, Johnson, and Mounce

Absent: Council Members – Mayor Beckman*

Also Present: City Manager King, City Attorney Schwabauer, and City Clerk Blackston

*NOTE: Mayor Beckman recused himself from this meeting and was not in attendance.

B. PUBLIC HEARINGS

B-1 Notice thereof having been published according to law, an affidavit of which publication is on file in the office of the City Clerk, Mayor Pro Tempore Hitchcock called for the public hearing to consider two appeals of the Planning Commission's decision regarding the Lodi Shopping Center project (Wal-Mart Supercenter) located at 2640 West Kettleman Lane:

- a) Appeal filed on 12/10/04 by Natalie Weber/Steven Herum of the firm Herum, Crabtree, Brown to the Planning Commission decision on 12/08/04 certifying Final EIR 03-01, approving Use Permit U-02-12, and Tentative Parcel Map 03-P-001; and
- b) Appeal filed on 12/13/04 by Timothy Cremin of the firm Steefel, Levitt & Weiss to the Planning Commission decision on 12/08/04 regarding two conditions:
1) Condition R of the use permit and tentative map approval resolution requiring signed leases for 50% of the existing Wal-Mart store before a building permit is issued for the new Supercenter and prohibits tenant restrictions; and 2) Condition requiring the project developer to fund the commercial linkage fee nexus study under Program 11 of the Housing Element and pay any adopted fees.

Item B-1 a):

Community Development Director Bartlam reported that the project involves Wal-Mart Supercenter at the southwest corner of Kettleman Lane and Lower Sacramento Road. Mr. Bartlam submitted an outline of his comments, as well as a letter dated January 28, 2005 from Fehr & Peers, and a letter dated February 1, 2005 from Applied Development Economics with attachments A & B (all filed). Mr. Bartlam explained that his comments would be focused on the letter distributed to Council by Steven Herum at the January 19, 2005 City Council meeting. Mr. Herum suggested in his January 19 presentation that the City should have used a regional commercial designation; however, the City has no such designation. Staff believes that the Neighborhood Community Commercial (NCC) designation is appropriate, as it has been utilized for projects of a similar type for the entire time that the General Plan has been in effect. This interpretation and precedence must be followed in this case as well. With respect to the zoning ordinance, Mr. Herum had stated that the Supercenter could not be classified as a department store. The issue was whether grocery sales could be included in the definition of a department store. Mr. Bartlam offered the example of the old Woolworth store, which had a soda counter. The soda counter was not a defining element, and Woolworth's was considered a department store. Likewise, the Wal-Mart Supercenter has a supermarket within a store that includes 36 other departments. Mr. Herum cited an unpublished Third District Court of Appeals decision that suggested the use of conservation easements as an appropriate mitigation tool. The Environmental Impact Report (EIR) cites an equally significant unpublished case that supports the City's position. Mr. Bartlam stated that the most important case is one that was published, has precedence value, and supports the City's conclusion. The City's point is made with respect to the conversion of agricultural land on pages 31 and 32 of the Draft

EIR. With regard to the treatment of agricultural/urban conflict, Mr. Bartlam felt that a reasoned analysis was provided within the Draft and Final EIR. Mr. Bartlam stated that in the nine years he has served as the Community Development Director for Lodi, he had not received a single complaint regarding agricultural production, operation, or spraying. Both the City and County have right to farm ordinances that have protections for agricultural uses and their ability to continue operations. They provide the protections that potentially could harm further agricultural use on the edge of the City. The American Farmland Trust endorses buffers, which are less than those proposed in the EIR. The adjacent properties, which are the subject of the discussion, have all been sold to a local developer, so their long-term status for agricultural production is short; therefore, Mr. Bartlam stated the argument is moot. The City's economic expert believes there will not be store closures as a result of the Wal-Mart Supercenter project and, consequently, there will not be urban decay, blight, or physical deterioration. Mr. Herum had stated the City's analysis was flawed because it used the term "blight" along with the term "physical deterioration." Mr. Bartlam explained that these terms were used interchangeably in the Draft and Final EIRs. The City's economic expert believes that the study prepared by Dr. King (as submitted by Mr. Herum on January 19) misrepresented the facts. In reference to air quality, adverse health effects were analyzed in the Draft EIR on pages 114 to 116 and on page 28 of the Final EIR. Every project both known and anticipated in Lodi, as well as those in the County that may have a cumulative impact on Lodi as a result of this project, was taken into consideration. Mr. Herum suggested that projects in Stockton and Galt should have been considered. It is staff's contention that the California Environmental Quality Act (CEQA) does not require that distance of analyses. In reference to traffic impacts, staff is comfortable that no additional work is necessary. CEQA statutes and guidelines require analysis of energy impacts only when those impacts are potentially significant. The guidelines refer to Appendix F as an example of how to conduct the analyses. CEQA requires EIRs to include a discussion of potential impacts of the proposed projects when it is likely there will be a significant effect. The Governor's Office of Planning and Research indicates that Appendix F is to be taken as an example only and that there is no CEQA requirement to address energy impacts for projects where the impact is not potentially significant. CEQA requires that an analysis be done of the effects to public services when potentially physical impacts occur as a result of the project. Mr. Herum had suggested that, because Wal-Mart has less than adequate health benefits, its new employees would have to use the County hospital and, therefore, cause a need for expansion. Mr. Bartlam pointed out that even if all 250 new employees of the Wal-Mart Supercenter did not have health insurance and used County facilities, it still would not raise the argument to the level of a potential significant impact on the environment.

In reply to Mayor Pro Tempore Hitchcock, Mr. Bartlam stated that the timeline for cumulative impacts is drawn at the time the notice of preparation is issued for the Draft EIR. The notice was filed in excess of a year ago.

Steven Herum, attorney representing Lodi First, asked that the materials he provided to the City Clerk at the January 19, 2005, meeting be made part of this record. In addition, he submitted a memorandum from Philip King, Ph.D. dated February 2, 2005, and a packet of material divided into ten sections and previously made part of the record (both filed). He reviewed the latter as follows:

Section 1

Mr. Herum asked Council whether the introduction of uses to the Lodi community with low-paying jobs without benefits, with the indirect effect of driving out higher-paying jobs with benefits, is in the long-term interest of Lodi. Marlon Boarnet and Randall Crane, professors at U.C. Irvine, conducted a study for the Orange County Business Council on the impact of big grocers. The study concluded, "The aggressive entry of Supercenters such as those operated by Wal-Mart into the southern California grocery business is expected to depress industry wages and benefits at an estimated impact ranging from a low of \$500 million to a

high of almost \$1.4 billion per year, potentially affecting 250,000 grocery industry employees. ...any discount retailer, if it enters the food sector in southern California and then pays its grocery employees a wage that is comparable to what it pays its discount retail employees, will, in effect, be converting high-wage jobs into low-wage jobs.” Mr. Herum contended that people who currently have jobs will lose them. He cited the Rea and Parker analysis prepared for the San Diego County Taxpayers Association, which found that 1) “wages and benefits can be expected to decline in San Diego County by \$105 million to \$221 million annually”; 2) “application of the regional multiplier could expand this negative impact on wages to \$440 million per year”; 3) “The wage gap between grocery workers and Supercenter employees is expected to be approximately 60 cents per hour more in San Diego than in Los Angeles; and 4) “lost pension and retirement benefits will impact the region negatively by an additional \$80 million to \$170 million per year.” Mr. Herum stated that a third study done by Kenneth Stone, Professor of Economics at Iowa State University, found that for every low-paying job created by a Supercenter without benefits, two high-paying jobs with benefits were lost.

Mr. Herum explained that this is a de novo hearing, i.e. the appeal “wiped everything out” at the Planning Commission, and Council is to start afresh. He stated that the EIR is legally deficient. He contended that Wal-Mart uses a template for its EIRs and economic studies. The appellate court reviewed two of the templates in the Bakersfield case and concluded that the EIR was legally deficient.

Section 2

Mr. Herum stated that the EIR adopts a limited and constrictive Health and Safety definition of blight as its basis for analysis. He stated that it is too constrictive for a CEQA analysis. No authority supports equating urban decay with redevelopment blight. Response F-5 of the EIR states that the Draft EIR applies the Health and Safety Code definition because neither the CEQA statute nor the guidelines define “physical deterioration” as such, and the “blight” definition is the closest approximation in state law. Mr. Herum pointed out that this was the argument made in the two Bakersfield EIRs.

Section 3

Mr. Herum reported that page 17 of the appellate court opinion stated that “some of the parties use the term ‘urban blight,’ assuming that it is interchangeable with ‘urban decay.’ This is incorrect. ‘Blight’ is a term with specialized meaning that has not been shown to be applicable.” Mr. Herum maintained that the City should have used “urban deterioration.” The EIR states that it only looked at urban blight as defined by the Redevelopment Code. Dr. King looked at urban decay under CEQA and came to the conclusion that there would be significant store closures. Mr. Herum reported that as part of his comments he included a number of studies from other locations where Supercenters cause urban decay.

Section 4

In Response F-6 of the Final EIR, it states that the Oklahoma study has no direct relevance to the proposed project or the EIR analysis. Mr. Herum noted that Bakersfield made the same argument, saying that anecdotal studies from other areas are not evidence and they do not have to consider them.

Section 5

The appellate court decision, page 24, stated “BCLC also submitted numerous studies and articles analyzing the adverse effects other communities in California and elsewhere have experienced as a result of saturation of a market area with super-sized retailers. As relevant here, the authors found numerous adverse effects resulting from saturation of a market area with Supercenters and similar retail facilities. These effects include, but are not limited to, physical decay and deterioration resulting from store closures in the same market area due to competitive pressures. Studies discussing the experiences of other communities constitute important anecdotal evidence about the way the proposed shopping centers could serve as a catalyst for urban deterioration and decay in the City.”

Section 6

The appellate court decision, page 32, stated "the record contains numerous studies analyzing the adverse effects other communities have experienced when a market area was saturated with large-scale retailers such as traditional Wal-Mart stores and their siblings, Supercenters and Sam's Clubs. Studies discussing the adverse effects that other communities experienced after similar retail development constitutes important anecdotal evidence about the adverse impacts that the city may experience."

Section 7

Mr. Herum stated that according to the Final EIR, pages 31 and 32, the catchment (market) area of the Supercenter is from the Costco store in Stockton, east to Clements, and north to Galt. Mr. Herum contended that there were four omitted projects located in Stockton north of the Costco store, all within the catchment area. He stated that at the same time the notice of preparation was issued by Lodi, the Wal-Mart on Hammer Lane was being built and the Wal-Mart in the Spanos Center had been applied for and was a known project. Under Response F-12, it states "the comment fails to provide any reasoning or analysis as to how such distant projects could contribute to a cumulatively considerable effect associated with the project. This comment ignores the key CEQA phrases 'closely related.'"

Section 8

The Draft EIR indicates that consultants spoke to County planners about other stores. There is no evidence that they contacted city of Stockton planning officials. Mr. Herum believed that the "fatal flaw" was to say that these other projects were in a different town. He pointed out that "related projects" is not a term that is cut off by geography. The Bakersfield opinion stated that the other stores were in the same market area.

Section 9

The appellate court decision, page 29, states "The Gosford EIR and the Panama EIR considered each shopping center in isolation. The cumulative impacts sections of each EIR does not reference the other shopping center. BCLC argues that the failure to treat Panama and Gosford and relevant projects for purposes of evaluating cumulative impacts is an overarching legal flaw in both EIRs. There is some evidence showing that the two shopping centers will compete with each other. Some of the anchor tenants at both shopping centers are regional draws with a market area in excess of five miles. The Vencill report states that the market area for stores like Supercenters is about five miles. It concludes that the two shopping centers are in the same shopper catchment area and the Supercenters will compete with each other." Mr. Herum contended that it is not adequate to limit the projects in the cumulative impact analysis to only those in Lodi. The north Stockton projects referenced in his comment letter were relevant projects because that is what the Wal-Mart market study states, and materials from Dr. King expressly state that the two Wal-Marts in north Stockton are in the same market area. He pointed out that the City cannot draw from north Stockton for the customers and ignore the cumulative impacts that are between those customers and the proposed project.

In summary, Mr. Herum emphasized that the overarching issue is what kind of a community is desired for Lodi. He stated that Supercenters do not substantially increase sales taxes in a community. The Wal-Mart Supercenter will drive people out of business. He reiterated that it would take away higher-paying jobs with benefits and replace them with lower-paying jobs without benefits. He asserted that the EIR is legally deficient. He urged Council to follow the law, deny the project, and cure the defects in the EIR. He expressed concern that Community Development Director Bartlam referenced the January 19 hearing during his comments tonight. There is now a question of whether he has contaminated these processes by bringing in parts of what happened previously. It was Mr. Herum's understanding that for due process reasons the January 19 hearing had been wiped out. He reiterated his concern that Mr. Bartlam's reference to specific parts of the January 19 hearing contaminate the record, as though that hearing was being included here.

Hearing Opened to the Public

- Carol Thevriet stated she represents "Loving Hands Quilters," a group of six women who began making quilts for families of fallen soldiers in California. Wal-Mart granted them \$1,000 to help defray the cost of postage. In reference to Mr. Herum's comments, Ms. Thevriet stated that Bakersfield is a sprawling community with no boundaries and very unlike Lodi. In response to impacts on public services, Ms. Thevriet pointed out that the Spanos Center hires part-time employees, as do many other businesses. She urged Council to vote in favor of the Wal-Mart Supercenter project.
- Steve Gaines, Director of Retail Efficiency for Save Mart Supermarkets, submitted 1) newspaper article regarding S-Mart, 2) cover letter regarding two studies, 3) DSR Marketing Systems study of Victoria, Texas Wal-Mart Supercenter, and 4) DSR Marketing Systems study on Wal-Mart Supercenter's impact on grocery shopping patterns in Carson City, Nevada (all filed). He stated that in Victoria, Texas the number of supermarkets declined by 55% since the Supercenter opened ten years ago. He believed that the same situation could occur in Lodi leading to urban decay, reduced consumer choice, and leaving some parts of the community without the convenience of nearby groceries. The Carson City, Nevada study showed that Supercenter shoppers traveled twice as far as customers of other grocery stores. Added driving time increases pollution, traffic jams, and wear and tear on City roads. Mr. Gaines stated that this would not be consistent with the goals and guidelines of the Lodi General Plan circulation element, which is to encourage a reduction in regional vehicle miles traveled. He felt that the negative impacts of store closures, traffic, and increased air pollution are facts requiring further study and environmental mitigation. In addition, he believed that the Wal-Mart Supercenter project should have conditions relative to mitigating unnecessary energy expense in their environmental impacts.

In reply to Council Member Hansen, Mr. Gaines explained that there was a Save Mart building across the street from the former Smart Food store, which was later changed to S-Mart because it was sued by Smart and Final for using the word "smart" in its name. Mr. Gaines acknowledged that any entry into any market of a new retailer has impacts. He stated that the sales element of a Wal-Mart Supercenter is equivalent to three grocery stores.

- Jim Watt of Retail Strategies, speaking on behalf of Save Mart, submitted a copy of an analysis he prepared, dated January 12, 2005, and a letter dated February 2, 2005 regarding the Lodi Shopping Center's conformance with Lodi's Design Standards for Large Retail Establishments (both filed). Mr. Watt's economic report covered ten problem areas in the economic analysis prepared by the firm Applied Development Economics (ADE) that was included in the EIR. Mr. Watt stated that ADE's report has incorrect data, omissions, and an unreasonable interpretation of the data. He did not believe Council should rely upon the report as a factual document in making its decision. In putting together its data, ADE took a global look at how the supermarkets in Lodi were doing. He disputed ADE's conclusion that stores are on average performing at about the national level. If the stores are considered on an individual basis, it would be found that six out of ten stores are performing at a rate that is 25% below the national average. Mr. Watt stated that ADE totally misjudged the supermarket sales of a Wal-Mart Supercenter. It estimated the sales at \$24 million, which is about half of the actual figure. He pointed out if the amount of supermarket business that Wal-Mart does is underestimated, then the impact on the community will also be underestimated. Mr. Watt believed that the Supercenter would close three to four grocery stores that will never get filled again on Cherokee Lane and there will be further effects among small tenants that are part of those shopping centers. Mr. Watt stated that he spoke with every grocery store in Lodi as well as Orchard Supply and Kmart and all are concerned about this project given the recent introduction of the

Lowe's store. Mr. Watt stated that the design standards that Council adopted do not work for the Supercenter project and his letter gives the calculations upon which he made that decision. Lodi's design standard said that not more than 60% of the parking that serves the lot occupied by the large retail establishment can be in the front parking area. Given that and the out-parcels at the Supercenter, the factor is that 76% of the parking is in front of the store. There is another building (pad 12) on the site plan in excess of 25,000 square feet. If the same analysis is applied to that parcel, the field of parking is 78% in front. He concluded that the project is deficient in terms of the design standards and should be redesigned.

- Treacy Elliott stated that his opinion on this issue concurs with many of those presented by Mr. Herum tonight. The Wal-Mart Supercenter project is not in Lodi's best interest. Not including the impacts of two Supercenters within a ten-mile radius or other local projects is insufficient to make a sound objective decision. He urged Council to reject the EIR, or at a minimum, to ask that it be re-circulated. He stated that there has never been data presented that supports the notion that this project will provide \$640,000 in sales tax revenue as was claimed in much of the campaign literature. At best, the EIR shows approximately \$340,000 would be generated. He asked how other retailers in Lodi will survive when all of the retail businesses are being pushed to the four corners area. He also inquired how much the project will cost the citizens of Lodi. Mr. Elliott believed the Supercenter project would reduce the quality of life in Lodi.
- Brad Clark, District Manager for Food for Less and a Lodi resident, stated that he did not believe the EIR addresses urban decay. The Supercenter in Stockton already has graffiti on it. He felt that three grocery stores on a corner were too much. Food for Less pays a prevailing wage in the industry and its employees have benefits. The Wal-Mart Supercenter will replace high-paying jobs with low-wage jobs. Mr. Clark believed there would be an impact to other stores in the community as well.

In reply to Council Member Hansen, Mr. Clark felt that it was not a fair question to compare Food for Less with a Wal-Mart Supercenter store when considering impacts.

- Christopher Vigil stated that when the City embarked on the downtown restoration it also made a trust to the people of the City to reaffirm the old downtown. It believed that if Council approves the Supercenter project, it would be breaking that trust. He stated that Wal-Mart does not offer the type of merchandise that Lodi citizens go outside the City to purchase. Mr. Vigil stated that he saw a Council that was "under suspect of being intimidated". He asked Council to not oppose, but to "respectfully decline" this project.
- Tim Pryor stated that as an industrial real estate broker in the area he is vitally interested in bringing in employers to the region that create the kinds of jobs needed in the community for the quality of life that people enjoy in other parts of the state. He felt that Wal-Mart could take better care of its employees by spending just a fraction of what it devotes to ads marketing its humanitarian work or defeating opposing initiatives. Mr. Pryor felt that Wal-Mart's tactics show it has a guilty conscience.
- Dennis Norton stated that he and his wife filled out applications for work at grocery stores and they all stated that they were not hiring. The Wal-Mart Supercenter in Stockton offered his wife employment with benefits. He voiced support for the Lodi Supercenter project.
- Joyce Frances asked Council how it can build hundreds of houses and not put in facilities to care for the people. Ms. Frances stated that she is disabled and has to travel to Stockton to shop at the Wal-Mart Supercenter. She expressed support for the Lodi Supercenter project.

- Delores Geringer felt that Wal-Mart was being discriminated against. She pointed out that when Plummer Cadillac built a new dealership there was no mention of urban decay, nor was it told it would have to find a new tenant for its old building. She challenged Mr. Herum's assertion that Wal-Mart employees do not have health insurance. In reference to housing issues, Ms. Geringer noted that there are many houses and apartments available for rent in Lodi. She reminded Council that the majority of voters last November were in favor of the Wal-Mart Supercenter project.
- Ardith Philo spoke in favor of the Supercenter project. She believed that Wal-Mart was the only store that is community conscious. Ms. Philo stated that she and her father-in-law were disabled and found that Wal-Mart keeps the batteries in their electric carts charged, where other stores do not. The Wal-Mart employees are courteous, and the store provides jobs to the disabled and to senior citizens.
- Willi Dahlke, speaking on behalf of himself and his wife Helen who have lived in Lodi 31 years, voiced support for the Supercenter project. He believed that frivolous objections were being raised to try and frighten people. He noted that one-stop shopping is helpful to senior citizens.
- Cheryl Nitschke stated that downtown businesses would not be negatively impacted. She commented that many people shop where prices are lowest and others shop only at their favored grocery store.
- Jeri Proctor, Personnel Manager for Lodi Wal-Mart, reported that the store has 330 employees. Of these, 80% are full time (working between 28 and 40 hours a week) and are eligible for benefits after six months. Part-time employees are eligible for benefits in approximately two years. Benefits are the same for all employees and there are four options from which to choose. In answer to Council inquiries, Ms. Proctor stated that the average wage is over \$10 an hour. At least two-thirds of the full-time employees have insurance. Full-time employees can opt not to have insurance. Wal-Mart pays approximately two-thirds of the cost of the health insurance for its employees.
- Mary Ann Bristow stated that she has benefits with Wal-Mart and is satisfied with them. She commented that no matter what is built on the corner it will impact traffic, etc.
- Dawn Squires stated that Safeway deserted its customers on the eastside of Lodi years ago when it moved its store to the westside. She voiced support for the Supercenter project.
- Virginia Lahr felt that Wal-Mart was good for senior citizens because of its low prices. She gave examples of lower prices at Wal-Mart compared to other stores for certain merchandise. She did not believe that the project would result in decay or blight in the community. In reference to housing, Ms. Lahr pointed out that there is no affordable housing for low-income residents now.
- Michael Folkner, store manager for the Lodi Wal-Mart, reported that no one had asked him for information to include in the numerous studies and analyses that have been done. In answer to Council Member Hansen, Mr. Folkner stated that the Lodi Wal-Mart had a 10% decrease in sales since the Stockton Supercenter opened last October. He suspected that it would decrease even further when the second Stockton Supercenter on Eight Mile Road opened. He reported that, statistically, when a Wal-Mart Supercenter is opened, the general merchandise sales increases over the amount of a standard Wal-Mart store.
- Bill Crow stated that he read the EIR three times and found nothing wrong with it. He reminded Council that at last November's election the majority of voters voted in favor of the Wal-Mart Supercenter. He believed that the plans and design for the Supercenter were very good. Mr. Crow commented that statistics in reports can be skewed to reach any outcome desired.

- Joseph Pacino, Lodi First member, reported that the Bureau of Vital Statistics and the United States Department of Labor said that Wal-Mart employee benefits on average receive approximately 82 cents an hour and putting all other food retail sources together, they receive an average for benefits of \$6.32 an hour. The average salary for a Wal-Mart employee is \$8.32 an hour. The average for all the food retailers across the country is \$16.50 an hour including benefits. He stated that last year a woman who worked full time for Wal-Mart could only get a home through the Habitat for Humanity. He asked Council, if it approves this project, to require Wal-Mart to pay for the streets and street lights. He reported that there were 450 calls to Wal-Mart last year regarding safety issues. In the same period of time, Kmart received only 187 calls. Wal-Mart costs citizens more for the additional police services it uses. Mr. Pacino stated that the worst crimes happen at Wal-Mart. In addition, he believed that the prices of groceries were the same at Food for Less as they are at the Stockton Supercenter. Only 40% of Wal-Mart employees have benefits that they can afford to pay from their Wal-Mart earnings. In similar cities that have Supercenters, the sales increased in the first year, leveled off by the second year, and decreased by the third year of operation. Most of the products Wal-Mart sells are from China, and much of its groceries come from Mexico, Canada, and South America. He felt that the space would be better used for a Macy's, Costco, or other store. He commented that the people who own the property got a good bid from Wal-Mart, and they should pay for parking lot security and any effects they have on the environment. He reported there were 500 empty Wal-Mart buildings in other cities where Supercenters were built.
- Shawnee Spitler, with the law office of Donald Mooney, spoke on behalf of Citizens for Open Government. She stated that Citizens submit these comments in support of the appeal filed by Herum, Crabtree, and Brown and object to this project and approval of the Final EIR. She commented that her firm submitted a letter yesterday by facsimile (filed). She maintained that the City can and must negate the loss of prime farmland. The proposed Final EIR and the associated findings now before the Qty set forth a disarming proposition to ignore the significant impact of conversion of prime agricultural land. The EIR asserts that because no measure exists to mitigate this impact to a less than significant level the loss of prime farmland is an unavoidable consequence of development. It is legally invalid and factually unsupportive. A Third District Court of Appeals decision (Mountain Ranch) states that feasible mitigation measures that reduce but do not fully mitigate adverse environmental consequences must be implemented. Nothing in CEQA allows the Qty to avoid adopting feasible mitigation measures to reduce the proposed project's significant adverse impacts to the environment. The EIR states it is not possible to provide direct mitigation for the loss of specific parcels of agricultural land either whole or part. The EIR improperly rejects the use of agricultural conservation easements as an alternative source of mitigation. The EIR asserts that conservation easements and other similar devices that protect existing farmland from conversion do not mitigate the loss of a specific parcel of prime farmland. Ms. Spitler stated that this proposition improperly narrows the inquiry of impacts associated with the farmland conversion. In the Mountain Ranch decision, the Third District Court of Appeal recognized that conservation easements over existing prime farmland do mitigate some of the impacts associated with farmland conversion. The kangaroo rat case has been de-published by the Supreme Court. Ms. Spitler stated that the City is relying on incorrect law in its decision. A reasonable mechanism exists to implement the prime farmland conservation easement mitigation approach. The City may assess a reasonable in lieu per acre fee payable to the recently created Central Valley Farmland Trust. The EIR improperly limits its examination of impacts to just this specific parcel, rather than focusing on impacts to agricultural resources generally. When viewed in its proper context, impacts to agricultural resources can be mitigated either directly through restoration or indirectly via conservation easements. Ms. Spitler maintained that absent such mitigation the EIR is inadequate. The City failed to analyze the reasonable range of alternatives to the proposed project, which CEQA

requires. The starting point for such an analysis is the project definition. The definition cannot be so narrowly drawn as to preclude a meaningful alternative analysis or those undesirable to the project proponent. The Lodi Shopping Center EIR defines the objective of the project to meet only the proposed project. The EIR also uses the project objectives to fail to consider or reject environmentally superior alternatives and selects the proposed Wal-Mart Supercenter project as the only alternative that meets all the objectives. Ms. Spitler stated that the central error of the EIR in this regard is its insistence that the project must meet the requirements for Wal-Mart Supercenter and other retail stores. The alternative decision must focus on alternatives that avoid or substantially lessen any significant effects of the project. The EIR fails to provide a reasonable range of alternatives that avoid or substantially lessen the proposed projects significant impacts. The EIR concludes that the reduced size alternative would not avoid or substantially lessen environmental impacts. In reference to the alternative site location, the EIR concludes that the impact associated with the development of the Flag City site would be somewhat greater than for the proposed site. The EIR presents no alternative that avoids or substantially lessens the environmental impact of the proposed development. CEQA guideline 15126.6 is clear that the alternative discussion must describe a range of reasonable and feasible alternatives that would feasibly obtain most of the basic project objectives, but would avoid or substantially lessen any of the significant effects of the project. The EIR does not contain a single alternative that meets this standard and fails to contain a reasonable range of feasible alternatives. She requested that the document be revised and re-circulated for public review and comment.

In response to Council Member Hansen, Community Development Director Bartlam confirmed that an agricultural mitigation fee was not required for the Lowe's project and it is not required as part of the Lodi Shopping Center EIR.

- Darryl Browman, of Browman Development, reported that the property has been zoned in the General Plan for 15 years and it has been the area designated for big box development. The property was originally annexed in 1996 at the City's request to perpetuate the big box development in that area. The Lodi Shopping Center project will change the face of the intersection so that it becomes the retail dominant intersection for the City for generations to come. Lodi will have perpetuating sales growth in its community. Mr. Browman stated that he has been involved in this process for three years and in the EIR process for over two years. He believed the EIR was extensive and addresses every conceivable issue. Browman Development does not allow urban blight. Since 2003, 48% (i.e. 100% of people whose leases came up) of his small tenants renewed their leases. He reported that there traditionally is a carryover of 20% to 30% increase in taxable general merchandise sales in a Wal-Mart store when it converts to a Supercenter. As part of the Supercenter project, there will be 25 to 30 additional businesses. The project includes Title 24 green building features such as energy efficient lighting, heating, ventilation, and air conditioning, as well as heat reclamation in the grocery component. He commented that the Bakersfield case cited by Mr. Herum did not do an economic analysis. Lodi has been presented with two economic reports, both of which indicate that there will not be impacts on downtown. The reports found that over a short period of time the lost volume would be made up by everyone. In northern California, of 14 Kmart's and 14 Montgomery Ward stores that have closed, only two Kmart stores and one Montgomery Ward store has not been leased. Mr. Browman submitted a document showing replacement tenants for these stores (filed). He reported that the EIR addresses air quality and potential health impacts. In reference to agricultural mitigation, Mr. Browman pointed out that "you cannot create land." In response to Mr. Herum's reference to a template that Wal-Mart uses, Mr. Browman noted that the City controls the EIR and hired the consultant to prepare it.

- Tim Cremin of the law firm Steefel, Levitt & Weiss, representing Wal-Mart, strongly disagreed with Mr. Herum's position that the law or Bakersfield decision requires the Council to make a certain decision. He clarified that the City has to act in accordance with the law; however, the law does not dictate the result. The Council has the right to exercise its discretion based on facts presented to make a decision on the appeal and the project. In numerous places, CEQA states that its role is to be an information document, to provide Council and the public with information about environmental impacts for its consideration and deliberation, and for the Council to consider those issues in deciding whether or not to approve the project. It is up to the Council to decide, based on the EIR information, if an impact is significant or not significant, if a mitigation is feasible or not feasible, or whether a project that presents certain unavoidable impacts can still be approved by Council based on overriding consideration. He believed that all of Mr. Herum's objections on the appeal have been addressed by materials in the record including the EIR, staff reports, staff presentations, communications submitted by Fehr & Peers Transportation Consultants and Applied Development Economics, etc. In response to Mr. Herum's policy issue questions of what kind of a community is desired for Lodi and that a Supercenter would result in low-paying jobs without benefits, Mr. Cremin stated that this is not an appropriate part of the debate under the CEQA and zoning and planning decision before Council. CEQA is not meant to be used to regulate business or economic competition. The question is whether the economic impact would indirectly result in a significant physical impact. Mr. Herum emphasized the economic analysis and relies heavily on the Bakersfield case. The facts in Bakersfield were that the Council in that situation had an EIR that did not analyze economic impacts and possible indirect physical impacts resulting from them. The issue before the court in that case was, could the city decision not to analyze or consider the issue be upheld in the face of testimony and documents that were put in the record. The court said no, the city is required, based on reasonable evidence presented in the record, to analyze the issue and make the determination of whether or not the impact was significant. Lodi had two economic studies done that were included in the EIR. It looked at the loss of sales of different types of businesses in downtown and throughout the City, potential for closures, and impacts that indirectly lead to physical deterioration. That is substantial evidence that the community and the Council are able to consider and decide whether it is sufficient evidence to support a finding that that impact is less than significant. When presented with competing studies, Council retains the discretion to decide which of those studies it will rely on in making its decision. Mr. Cremin stated that Mr. Herum was making a form over substance argument when stating that the EIR was using the wrong standard for determining the significance of an economic impact in that it uses the word "blight," which is a defined term under redevelopment law and since CEQA is not redevelopment law it is really referring to urban decay. Ultimately what the EIR states is that it is not substantial evidence of significant adverse physical impacts. In reference to cumulative impacts, Mr. Cremin explained that at a certain point in time the EIR has to cut off a continual analysis process because otherwise a decision could never be made. Based on the date the notice of preparation was prepared, certain events were not known at that time and were not included in the analysis, which is in accordance with CEQA. In the Final EIR, the expert does say the existence of the Stockton Supercenter would not result in a greater loss of business to existing Lodi companies. In regard to agricultural mitigation, there is one case that was published which upheld the city decision to find that agricultural mitigation was infeasible. CEQA allows the right to scope the alternatives based on objectives, both the applicant's and the City's, for the project. Stating that a commercial center destination is desired in Lodi to complete the four corners area is appropriate. A smaller project would still result in loss of prime agricultural land. What is placed on the property will not change that impact. The guidelines say that an alternative location is infeasible. The ground for finding it infeasible can be objectives, General Plan consistency, or control issues for the proponent. Design criteria for the parking lot was carefully reviewed with staff and was

measured from the sides of the building out. The project meets that criteria. The City has broad discretion to interpret its General Plan policy and programs and harmonize competing interests.

- Betsy Fiske, spokesperson for Lodi First, stated that the members of the group agree with Mr. Herum's remarks about the inadequacy of the EIR. Lodi First is concerned about the effects the Supercenter would have on the Lodi community. There are 341 Wal-Mart properties now available.
- Rick Salton, Union Representative for Local 588 in Lodi and Stockton, stated he represents workers at Safeway, Albertsons, Raleys, Save Mart, and Rite Aide. He stated that there are inadequacies in the way the questions were asked in the EIR regarding the impact of jobs in this area. Workers in Stockton have been greatly effected by the Supercenter. Many of the employees he represents earn over \$18.78 an hour and have full benefits paid 100% by their employers. He believed that the Supercenter would cause urban blight and decay. He asked Council to reject the EIR and approve Mr. Herum's appeal. In answer to Council inquiries, Mr. Salton stated that some of the employees in Stockton who worked in stores on Hammer Lane before the Supercenter was built were working 40 hours and are now working 24 hours a week. The Save Mart store on Hammer Lane has reduced its workforce, and Raley's in Stockton is going through layoffs. He acknowledged that the Target expansion in Lodi will have a negative impact on Lodi grocery stores as well. The starting wage for a service clerk/bagger is \$8.39 in addition to full benefits. Mr. Salton acknowledged that there is little turnover in the grocery stores and jobs are difficult to obtain.
- Sarah Heberle stated that if grocery clerks smile at customers and give them good service the stores will be able to compete and stay in business. She stated that price is not as important to the majority of people as good service.
- Lester Hixson alleged that Mr. Herum is also an attorney for Alex Spanos who is building the Supercenter on Eight Mile Road and wondered whether his comments were not a conflict of interest. Mr. Hixson believed that the EIR was complete and should be approved.
- Ken Lopes recalled that no one expressed any concern about the small stores on Cherokee Lane when the large supermarket opened there recently. They were forced to compete by lowering their prices.
- Aimee Huggins stated that she was a Safeway employee for four years. She felt that higher-paying jobs would be lost as a result of the Supercenter and believed it was not fair competition.

Community Development Director Bartlam reported that the notice of preparation was issued in April 2003. The application for the building permits for the Supercenter on Hammer Lane in Stockton was done in June 2003 and for the Supercenter in the Spanos development in November 2003. He disagreed with Mr. Watt's interpretation of the design standards for parking and confirmed that the project meets the standards. Staff believes the agricultural land issue was responded to with respect to the EIR and issues raised by Mr. Herum. Unpublished cases do not take precedence over published cases. The alternative analysis discussion is sound and considers the objectives of the project, which includes the City's objectives for the site via the General Plan and the applicant's objectives.

In answer to Council inquiries, Mr. Bartlam stated that it is staff's opinion that there was no need through CEQA to contact the city of Stockton or other surrounding cities. With respect to the impacts of this project and cumulative impacts, the surrounding area was

considered. Staff took into consideration projects that were proposed and approved, but not built within the City of Lodi, as well as those that may have been within the County jurisdiction. The purpose of the economic analysis was to look at what the impacts to Lodi stores were as a result of the Supercenter. Economic analysis is simply information as it relates to taxable sales in Lodi. The Council previously approved a policy that requires any development within the designation to do an analysis of its impacts to downtown. One study was narrowly focused on that issue and another study was citywide. Based on everything that has been submitted, Mr. Bartlam concluded that his recommendation continues to be for Council to uphold the Planning Commission certification.

At the request of Council Member Mounce, Mr. Bartlam explained why an EIR was not required for the Rancho San Miguel store on Cherokee Lane.

Rebuttal Statement by Steven Herum

Steven Herum stated that regarding cumulative impacts there is a huge inconsistency. The Final EIR said it did not study projects outside Lodi. The comment from Mr. Bartlam is inconsistent and conflicts with what the EIR said as the explanation for not including the Stockton projects. He noted that the City contacted the County Senior Planner on May 28, 2004, yet Mr. Bartlam reported that 2003 was the cutoff date. Both of the Stockton stores were already announced by the 2003 date. One of the stores was up and running and the other was approved by May 28, 2004. He again asked Council whether Lodi is a community where it wanted to introduce uses that produce low-paying jobs without benefits and drive out better-paying jobs. He pointed out that the most telling evidence spoken tonight was from the Lodi Wal-Mart manager who said his sales decreased 10% after the Stockton Supercenter opened. This proves that the cumulative impacts were done wrong because there is a relationship between the stores in north Stockton and Lodi.

In reply to Council Member Hansen, Mr. Herum stated that he has never represented the A.G. Spanos Company with respect to the shopping center on Eight Mile Road. The property where the Supercenter is being built was sold to Wal-Mart and it is not an A.G. Spanos project.

Public Portion of Hearing Closed

Council Member Hansen commented that the process for this store has been greater than any commercial or retail development that has ever occurred in Lodi. He believed the motive of Mr. Herum was to represent his clients who do not want a Wal-Mart Supercenter built in Lodi. Likewise, the unions do not want the project built. He recalled having supported taking the matter to a vote of the people. The result was a majority who voted not to restrict the size of retail, because they were in favor of the Supercenter project. Mr. Hansen believed the Council should uphold the Planning Commission's decision that the EIR was adequate.

Mayor Pro Tempore Hitchcock believed there was a high chance that there would be closures, which could result in blight. She also felt that higher paying jobs would be impacted and replaced with lower paying jobs. This would result in a greater need for public services. She expressed her opinion that the matter should be looked at in greater detail. She also voiced concern about the timeliness issue and the statement that the loss of prime farm agricultural land cannot be mitigated. She believed that agricultural land mitigation was possible and should be more fully addressed.

Council Member Mounce believed that blight was based on the conditions seen on the eastside of the community everyday. She was unsure if the Supercenter would be blighted and questioned whether the EIR could prove or disprove it anyway. She stated that Mr. Browman had done an excellent job in maintaining the buildings he has and has proven to be a responsible landlord. Ms. Mounce stated that her core political beliefs are free enterprise and personal property rights and that is what she would base her decision on tonight.

Council Member Hansen suspected that if some stores closed others would come in. Mr. Hansen pointed out that it is consumers, by their choice, that have an impact on businesses and he felt they should have the right to make that choice.

Mayor Pro Tempore Hitchcock noted that every day laws are legislated that limit competition and prevent monopolies.

Council Member Johnson stated that competition can produce positive results. Mr. Johnson anticipated that there would be an impact from the Supercenter project; however, he did not believe it would be catastrophic.

MOTION / VOTE:

The City Council, on motion of Council Member Hansen, Johnson second, adopted Resolution No. 2005-26 certifying the Final Environmental Impact Report (EIR-03-01) relating to the Lodi Shopping Center; State Clearinghouse No. 2003042113. The motion carried by the following vote:

Ayes: Council Members – Hansen, Johnson, and Mounce

Noes: Council Members – Hitchcock

Absent: Council Members – Mayor Beckman

Item B-1 b):

Community Development Director Bartlam stated that two conditions of the Planning Commission's resolution were appealed by the law firm of Steefel, Levitt & Weiss. The first condition deals with the re-tenanting issue. It is the Planning Commission's and staff's opinion that this condition is required in order to set the tone as to its expectation of conduct for the continued development of the center. The discussions that have taken place with the project proponent have been clear that the expectation is that they will fill the existing space before the Supercenter is built. The project proponent had expressed agreement to that expectation. Mr. Bartlam recommended that the Planning Commission's decision was appropriate and it should be upheld.

In reference to the second issue, Mr. Bartlam explained that the Planning Commission felt that Program 11 (the commercial linkage fee implementation measure) should be applied to this project however possible. The study has not been completed and, therefore, a fee does not yet exist. The Planning Commission action was to require the project proponent to pay for the study, the City would conduct it, and the project would be responsible for paying whatever fee the Council ultimately decided was appropriate as a result. Mr. Bartlam recommended that Council adopt the "blue sheet" resolution (filed), which provides for Conditions R and EE.

Tim Cremin of the law firm Steefel, Levitt & Weiss, representing Wal-Mart, stated that he was seeking an alternative condition as a replacement to the re-tenanting condition that the Planning Commission put on the project. Wal-Mart has agreed to sell the building of its existing Wal-Mart store to Browman Development, so it is giving up control of the building. It was concerned about holding its permits to an issue that it would not have direct control over, which was the re-tenanting of the store no longer owned. In addition, he questioned the timing and decision to put the burden of the conducting the study on this project.

In reply to Council Member Hansen, Mr. Cremin stated that it is a citywide study that needs to be done. It is a global City issue, not a project-specific issue. Other communities have studied the issue of whether commercial development creates the need for housing. As an example, San Francisco adopted a fee that it imposes on all commercial development on a square footage basis. It is applied uniformly and is an ordinance of general application to commercial development. He objected to the assertion that Wal-Mart

presents a special issue of a commercial development potentially creating the need for housing. He acknowledged that, during the Measure R campaign, Wal-Mart issued fliers saying that there would be a new tenant in the old building.

Darryl Browman explained that when he is marketing property he needs to be able to show that the space is deliverable. Without Wal-Mart being under construction on the new Supercenter, he cannot tell tenants that the space would be deliverable at a certain time. Mr. Browman stated that he was committed to buying the space and was comfortable that it would be re-tenanted. He submitted a document showing Sunwest Plaza leases in 2003 and 2004 (filed). It may be necessary to demolish the existing building in order to get the best tenant. He submitted alternate condition language for the resolution (filed). He explained that because the building is 120,000 square feet, a 60-foot separation must be maintained. The building is 380 feet across the front, not including the garden center, and 312 feet deep. If there is not one large tenant, flexibility is needed to demolish the building so the number of junior anchors can be expanded. In reference to the nexus study and housing fee, Mr. Browman stated it was unfair to place the entire burden on this project to do the study when there is no plan yet devised that would effect all commercial properties.

In response to Council Member Johnson, Mr. Browman stated that it had always been his intention to buy the old Wal-Mart building. He had told Wal-Mart that the only way he would sell the other property was if it sold him its current building. Wal-Mart has been willing to release any conditions for re-tenanting and reuse of the building.

In reference to Mr. Browman's alternate language for the resolution, Mr. Bartlam stated that his experience with having cash deposits and bonds as security for an action has not been positive. In that scenario, the City would be in the position to go out to bid to hire a demolition contractor, hire them, make sure they have all the necessary insurance, and tell them they must enter someone else's property to demolish the building. Mr. Bartlam felt that 30 days was plenty of time, as it should not take 60 days after they have moved in for one of the three options to occur. In addition, there ought to be substantial penalty deposited as well to make them want to enforce the condition.

City Manager King expressed concern that, depending upon the age of the current building, the developer is creating a Proposition 8 appeal situation if the building should remain vacant.

Mr. Browman reiterated that Browman Development would buy the old Wal-Mart building. He emphasized the need for the language to include flexibility for demolition and the ability to sell.

Council Member Hansen asked how long it would take to build the Supercenter, to which Mr. Browman estimated ten months as a best case scenario.

At the request of Council Member Hansen, Mr. Bartlam reviewed the upcoming processes for the Supercenter project. He estimated a four-month review period for the project in plan check and six to eight months before construction could begin.

Hearing Opened to the Public

- Mark Green, owner of Strings restaurant, stated that he just signed a ten-year lease. He was relieved to know that Mr. Browman would be in control of the whole center. He pointed out that Mr. Browman has a huge economic incentive to fill the old Wal-Mart building and did not want the City to put in place any restrictions that would slow him down.
- H.D. Carter stated that he was in favor of Wal-Mart and did not think there would be a problem finding a tenant for the old building.

- Iola Jochim suggested that the old Wal-Mart building be converted to a bowling alley.
- Michael Folkner spoke in favor of the appellant and the alternate resolution language that Mr. Browman presented.
- Gary Buzunis stated that there is very little retail space available in Lodi now. For tenants to be willing to tie up a large amount of capital, they need a firm date. Most prospective tenants will not project out more than one year. The City is requesting Mr. Browman to have a tenant prior to their building permit. Many large stores would prefer to buy the land and construct a building to suit their needs. Mr. Buzunis explained that Mr. Browman needs a start date, i.e. a building permit.
- Steve Gaines submitted a list of 340 vacant Wal-Mart buildings (filed). He asked Council to deny the appeal and make sure a tenant is secured before allowing them to break ground on a new store.
- Treacy Elliott asked to be provided with the amount that the Supercenter development will cost the City, e.g. for infrastructure improvements, etc. He stated that Mr. Browman understood what the challenges were since the beginning of this process and to back out now would not be honorable. He asked Council to deny the appeal.
- Betsy Fiske stated that in at least two Measure R campaign fliers, Wal-Mart promised they would have a tenant in place before construction began on the new building. She urged Council to require that they have a tenant in place before they get a building permit.
- Aimee Huggins expressed concern that the contract of sale between Wal-Mart and Mr. Browman could in itself contain conditions as to what Mr. Browman can and cannot do with the property.
- Steven Herum, representing Lodi First, stated that the condition is not strong enough. It should reflect promises made during the election and be meaningful. The condition merely requires that leases be entered into. He pointed out that Browman Development could enter into a lease with a newly-formed company and the lease could be for \$1. Once 50% of the site is leased then the condition would be satisfied and the Supercenter could open. He suggested a requirement that 50% of the site be leased and occupied, and that the sales tax revenue be equal to or greater than the sales tax revenue that is currently being leased off the property.
- Tim Howard cautioned Council on setting a new precedence in requiring conditions. He stated that this Country is about free enterprise; the market dictates it, and the market will fill the voids.

In response to Council Member Hansen, City Attorney Schwabauer suggested that if Council finds the public policy is such that this condition should be applied, that it ought to be reapplied in similar circumstances. If the facts and circumstances are the same, then Council ought to apply the same reasoning.

Rebuttal Statement by Darryl Browman

Mr. Browman stated that he is committed to getting the space re-leased. He again asked that the condition be modified so that he has the ability to lease, demolish, or sell to a bona fide retailer.

Public Portion of Hearing Closed

Discussion ensued regarding possible amendments/compromises to Mr. Browman's proposal.

MOTION #1:

Council Member Mounce made a motion, Hitchcock second, to deny the appeal and approve the resolution as presented by staff.

DISCUSSION:

City Attorney Schwabauer suggested that Council may wish to continue the public hearing and direct staff to work with Mr. Browman and his counsel to arrive at a condition that all are satisfied with and is enforceable.

MOTION WITHDRAWN:

Mayor Pro Tempore Hitchcock, withdrew her second, and the motion died for lack of a second.

MOTION #2 / VOTE:

The City Council, on motion of Mayor Hitchcock, Johnson second, continued the public hearing to consider the appeal of Timothy Cremin of Steefel, Levitt & Weiss and affirming the Planning Commission's decision on December 8, 2004, regarding two conditions relative to the Lodi Shopping Center project (Wal-Mart Supercenter) located at 2640 West Kettleman Lane to the regular City Council meeting of February 16, 2005. The motion carried by the following vote:

Ayes: Council Members – Hansen, Hitchcock, and Johnson

Noes: Council Members – Mounce

Absent: Council Members – Mayor Beckman

C. ADJOURNMENT

There being no further business to come before the City Council, the meeting was adjourned at 12:55 a.m., Friday, February 4, 2005.

ATTEST:

Susan J. Blackston
City Clerk